STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY JAMES WESTBROOK,

Defendant-Appellant.

UNPUBLISHED
November 2, 1999

No. 208935
Jackson Circuit Court
LC No. 97-081679 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM PAUL COWAN,

Defendant-Appellant.

No. 208975
Jackson Circuit Court
LC No. 97-081678 FC

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

TALBOT, J., (*concurring*).

I concur in the result reached by the majority but write separately to urge our Supreme Court's reconsideration of the analysis of lesser included offenses established in *People v Ora Jones,* 395 Mich 379; 236 NW2d 461 (1975).

The case against defendant Bradley James Westbrook presents a particularly clear example of just how absurd the rule in *Ora Jones* and its progeny can be. Counsel for defendant Westbrook specifically acknowledged at trial that an armed robbery had occurred, but denied that defendant Westbrook was involved. There was no evidence presented at trial to support a finding that anything less than a completed armed robbery was at issue. Nevertheless, at the close of proofs, defendant requested an instruction of the offense of assault with intent to rob while armed. The trial court refused

to give the instruction because the evidence did not support it. And now this Court is required to find the trial court's decision was error, albeit harmless, because assault with intent to rob while armed is *in theory* a necessarily included lesser offense of armed robbery.

In a case such as this, where defendant denies any involvement in an undisputed crime, requiring instruction on a lesser offense that is contrary to all the evidence flies in the face of common sense. It defies logic to require instruction on an inchoate robbery where defendant himself acknowledges that a completed robbery occurred and where he unambiguously asserts that he played no part in it.

I invite our Supreme Court to show its confidence in the ability of trial judges to "exercise sound discretion in determining which defense theories can be rationally supported by the evidence fairly set forth at trial." *People v Perry,* 470 Mich 55, 70; ___ NW2d ___ (1999)(Brickley, J., dissenting). The fictional analysis of lesser included offenses that has developed since *Ora Jones, supra,* insults the trial judge, creates an arbitrary series of hoops for trial lawyers, and interferes with the jury's ability to reach a true verdict. I urge our Supreme Court to definitively overrule *Ora Jones* and vest the discretion for jury instruction decisions in the trial court where it belongs.

/s/ Michael J. Talbot